

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

Paul Denton,
Plaintiff,

v.

Civil No.: 07-2670-D/An

United States,
Defendant.

AMENDED MOTION AND MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS

This is an action under the Federal Tort Claims Act (FTCA) for injuries the Plaintiff allegedly sustained on October 1, 2003 at O'Hare International Airport and the Metropolitan Correctional Center (MCC) in Chicago, Illinois. The United States moved for dismissal (DE # 19) pursuant to Fed. R. Civ. P. 12(b)(3) and (6). In its motion, the United States argued, among other things, that the suit is barred by the statute of limitations because the Plaintiff did not file an administrative tort claim within two years of the alleged injury. The United States now amends its motion and memorandum to address two issues asserted by the Plaintiff.

I. The Plaintiff is not entitled to equitable tolling of the limitations period.

In his response to the dismissal motion, the Plaintiff argues that he could not have filed his administrative claim within the two years allowed because he was "on 24 hour lock-down" in the Segregated Housing Unit (SHU). (Plaintiff's Reply to Motion to Dismiss, DE # 20, pg. 2- 3). In fact, the Plaintiff was in the SHU for *only one or two days* early in the two year time frame. See the Quarters Report attached as an Exhibit. The Quarters report is a

business record kept by the Bureau of Prisons (BOP) and shows where the Plaintiff was housed on any given day. The SHU is designated as “House Z,” and the Plaintiff was there from October 6, 2003 until October 7, 2003. When the Plaintiff was released from the SHU on October 7, 2003, he still had most of his two year time frame still available. He missed the administrative claim filing deadline by more than a year, but not because of one or two days in the SHU.

II. The Defendant has not waived the limitations defense.

The Plaintiff also argues that the United States implicitly waived its limitations defense when the BOP denied the administrative tort claim on the merits, rather than denying it as untimely. (See DE # 20, Exh. B, Denial letter from Richard W. Schott, BOP Regional Counsel). The Plaintiff cites no legal authority – and counsel for the Defendant has found no legal authority – for the proposition that a limitations defense is implicitly waived by an agency’s consideration of an untimely administrative tort claim. On the contrary, the Supreme Court, well over a century ago, rejected the proposition that agency officials could waive the government’s limitations defense. As stated in *Finn v. United States*, 123 U.S. 227, 232-33 (1887):

An individual may waive such a [limitations] defense, either expressly or by failing to plead the statute; but *the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.* Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous. (emphasis added).

In other words, no one with the BOP had authority to waive the limitations defense, not by “implication” or otherwise. Even if a BOP official had undertaken to *explicitly waive* the limitations defense, he could not have done so. *Munro v. United States*, 303 U.S. 36, 41 (1938) (citing *Finn*) (“The District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States.”). *See also, Lomax v. U.S.*, 155 F.Supp. 354, 358 (E.D. Pa. 1957)(holding that “limitations can be successfully urged as a defense even where there is an apparent waiver of the defense” by a government attorney).

Relying on these Supreme Court cases, the Sixth Circuit has rejected the precise argument made by the Plaintiff. *Ball v. U.S.*, 101 F.2d 272 (6th Cir. 1939). *Ball* began as a suit to recover benefits under a policy of war risk insurance. In response to the government’s limitations defense, the *Ball* plaintiff argued that the government had implicitly waived that defense because the Veterans Administration had considered an untimely administrative claim on the merits. The Sixth Circuit held that the agency’s on-the-merits consideration of a time-barred claim did not waive the limitations defense in subsequent litigation. In a factually similar case, the Third Circuit reached the same conclusion in *Roskos v. U.S.*, 130 F.2d 751 (3rd Cir. 1942): “It is well settled that, while the Veterans Administration has authority to, and does, consider claims upon which the right to sue has been lost by lapse of time, such consideration cannot . . . raise the fallen bar of the [limitations] statute.” *Id.* at 753.

It appears that the Fourth Circuit is this only court to have considered this issue in an FTCA case, and that court also rejected the Plaintiff’s implied waiver argument. In *Anderegg v. United States*, 171 F.2d 127, 128 (4th Cir. 1948), the Court of Appeals rejected

the “[c]ontention . . . that the limitation of the [FTCA] was waived because [the administrative] claim was filed with and considered by the War Department.”

Respectfully submitted,
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United States Attorney

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CERTIFICATE OF SERVICE

I, William W. Siler, Assistant U.S. Attorney, certify that the foregoing has been electronically filed on this date. I further certify that a copy of the foregoing has been mailed to Paul S. Denton, Reg. No. 2948-044, FCI Memphis, P.O. Box 34550, Memphis, TN 38184-0550.

s/ William W. Siler
Assistant U.S. Attorney

Date: May 1, 2008

CCCRJ 531.01 *
PAGE 001 OF 001 *

INMATE HISTORY
QUARTERS

* 04-18-2008
* 11:05:07

REG NO.: 29485-044 NAME....: DENTON, PAUL STACY
CATEGORY: QTR FUNCTION: PRT FORMAT:

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
MEM	M03-312L	HOUSE M/RANGE 03/BED 312L	02-28-2008 1109	CURRENT
MEM	M04-403U	HOUSE M/RANGE 04/BED 403U	02-21-2008 1153	02-28-2008 1109
MEM	S02-207L	HOUSE S/RANGE 02/BED 207L	05-16-2007 1449	02-21-2008 1153
MEM	S01-106L	HOUSE S/RANGE 01/BED 106L	05-15-2007 0928	05-16-2007 1449
MEM	S01-906U	HOUSE S/RANGE 01/BED 906U	04-24-2007 1344	05-15-2007 0928
MEM	M02-202U	HOUSE M/RANGE 02/BED 202U	02-18-2007 1252	04-24-2007 1344
MEM	M02-908U	HOUSE M/RANGE 02/BED 908U	02-07-2007 1443	02-18-2007 1252
MEM	M02-218U	HOUSE M/RANGE 02/BED 218U	02-06-2007 1337	02-07-2007 1443
MEM	Z01-109UAD	HOUSE Z/RANGE 01/BED 109U AD	02-03-2007 1539	02-06-2007 1337
MEM	M02-202U	HOUSE M/RANGE 02/BED 202U	12-12-2006 1530	02-03-2007 1539
MEM	M01-903U	HOUSE M/RANGE 01/BED 903U	12-11-2006 1844	12-12-2006 1530
MEM	R01-001L	HOUSE R/RANGE 01/BED 001L	12-11-2006 1659	12-11-2006 1844
OKL	C10-429L	HOUSE C/RANGE 10/BED 429L	12-06-2006 1641	12-11-2006 0925
THP	E02-209L	HOUSE E/RANGE 02/BED 209L	07-20-2005 0842	12-06-2006 0930
THP	E02-214U	HOUSE E/RANGE 02/BED 214U	03-23-2005 1025	07-20-2005 0842
THA	J04-056U	HOUSE J/RANGE 04/BED 056U	11-16-2004 1800	03-23-2005 1010
THA	J03-038U	HOUSE J/RANGE 03/BED 038U	09-01-2004 1405	11-16-2004 1800
THA	R01-001L	HOUSE R/RANGE 01/BED 001L	09-01-2004 1110	09-01-2004 1405
OKL	E04-629L	HOUSE E/RANGE 04/BED 629L	08-16-2004 1505	09-01-2004 0830
OKL	E11-510U	HOUSE E/RANGE 11/BED 510U	11-13-2003 1700	11-17-2003 0900
CCC	C04-012U	HOUSE C/RANGE 04/BED 012U	11-09-2003 1240	11-13-2003 2240
CCC	C01-023L	HOUSE C/RANGE 01/BED 023L	11-09-2003 1237	11-09-2003 1240
CCC	A01-015L	HOUSE A/RANGE 01/BED 015L	11-07-2003 1104	11-09-2003 1237
CCC	A01-015L	HOUSE A/RANGE 01/BED 015L	11-06-2003 2021	11-07-2003 0604
CCC	R01-001L	HOUSE R/RANGE 01/BED 001L	11-06-2003 1042	11-06-2003 2021
OXF	W06-026L	HOUSE W/RANGE 06/BED 026L	11-05-2003 1622	11-06-2003 0610
OXF	R01-001L	HOUSE R/RANGE 01/BED 001L	11-05-2003 1345	11-05-2003 1622
WAS	B03-111LPS	HOUSE B/RANGE 03/BED 111L PS	10-07-2003 1425	11-05-2003 0945
WAS	B04-109UPS	HOUSE B/RANGE 04/BED 109U PS	10-07-2003 1142	10-07-2003 1425
WAS	R01-001L	HOUSE R/RANGE 01/BED 001L	10-07-2003 1045	10-07-2003 1142
OXF	Z03-003LAD	HOUSE Z/RANGE 03/BED 003L AD	10-06-2003 1658	10-07-2003 0550
OXF	R01-001L	HOUSE R/RANGE 01/BED 001L	10-06-2003 1400	10-06-2003 1658
CCC	C02-006U	HOUSE C/RANGE 02/BED 006U	10-02-2003 1450	10-06-2003 1031
CCC	A01-014U	HOUSE A/RANGE 01/BED 014U	10-01-2003 1854	10-02-2003 1450
CCC	R01-001L	HOUSE R/RANGE 01/BED 001L	10-01-2003 1657	10-01-2003 1854
CCC	R01-001L	HOUSE R/RANGE 01/BED 001L	10-01-2003 1655	10-01-2003 1658
OKL	C04-410L	HOUSE C/RANGE 04/BED 410L	09-29-2003 1627	10-01-2003 0800

G0000 TRANSACTION SUCCESSFULLY COMPLETED